IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Opinion on Remand

STATE OF TENNESSEE v. COURTNEY PARTIN

Appeal from the Criminal Court for Campbell County
No. 11082 E. Shayne Sexton, Judge

No. E2004-02998-CCA-R3-CD - Filed November 30, 2007

This case is before the court upon the United States Supreme Court's remand for further consideration of the sentences imposed in light of Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). Partin v. Tennessee, ___ U.S. ___, 127 S. Ct. 1240 (2007). We hold that the trial court applied enhancement factors which were not found by a jury beyond a reasonable doubt, in violation of the defendant's Sixth Amendment right to a jury trial. Because the error was not harmless beyond a reasonable doubt, we reverse the judgments and remand for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed; Case Remanded

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Douglas A. Trant, Knoxville, Tennessee, for the appellant, Courtney Partin.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William Paul Phillips, District Attorney General; and Michael Olin Ripley, Senior Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The issue before the court relates to the sentencing procedure employed by the trial court pursuant to the Sentencing Reform Act of 1989 as it existed before its 2005 amendments. The defendant, a Range I offender, was sentenced under the Act to twenty-four years for attempted first degree murder and to five years for aggravated assault. The sentences were imposed to run consecutively for an effective twenty-nine-year sentence. The trial court applied several enhancement factors in the sentencing process, including the defendant's history of criminal convictions or behavior, that the defendant was a leader in the commission of the offense, that the personal injuries inflicted or the property damage sustained by or taken from a victim was particularly great, and that the crimes were committed under circumstances in which the potential

for bodily injury to a victim was great. The court also enhanced the attempted first degree murder sentence because the defendant used a firearm in the commission of the offense. See T.C.A. § 40-35-114(1), (2), (6), (9), (16) (Supp. 2001). The court allowed mitigation for the defendant because he had worked at times and had the support of his mother. See T.C.A. § 40-34-113(13). The court found that the enhancement factors "far outweigh[ed] any mitigating factor" and imposed enhanced sentences. The trial court also found that the defendant's record of criminal activity was extensive and imposed consecutive sentences. See T.C.A. § 40-35-115(b)(2).

On appeal to this court, the defendant claimed sentencing error because the trial court made judicial findings of fact relative to enhancement factors other than the defendant's prior criminal history and that those findings were constitutionally required to be made by a jury, in accord with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). This court held that the defendant waived this issue by failing to raise it at the sentencing hearing, in accord with our state supreme court's pronouncement in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) ("Gomez I"). The United States Supreme Court then granted certiorari, vacated, and remanded both the Tennessee Supreme Court's Gomez I opinion and the opinion of this court in the defendant's case relying upon Gomez I with instructions that both cases be reconsidered in light of Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). See State v. Courtney Partin, No. E2004-02998-CCA-R3-CD, Campbell County (Tenn. Crim. App. Mar. 21, 2006), app. denied (Tenn. May 30, 2006), cert. granted, vacated, and remanded sub nom Partin v. Tennessee, ___ U.S. ___, 127 S. Ct. 1240 (2007).

In Gomez I, our supreme court upheld the pre-2005 version of the Sentencing Reform Act of 1989 in the face of a Sixth Amendment right-to-jury-trial challenge. Gomez, 163 S.W.3d at 654-58. In Cunningham, the United States Supreme Court rejected a California sentencing statute which allowed sentence enhancement based upon judicially determined facts other than the existence of prior criminal convictions. See Cunningham, 549 U.S. ____, 127 S. Ct. 856. Upon reconsideration of Gomez, our supreme court held that in light of the dictates of Cunningham, the Tennessee sentencing statute violated the Sixth Amendment. Gomez, ___ S.W.3d ___ (Tenn. 2007) ("Gomez II").

However, the Gomez II court did not resolve the looming question of whether a defendant waives his Sixth Amendment sentencing claim by failing to raise the issue in the trial court. The court held that it was unnecessary to determine whether Gomez and his co-defendant were entitled to plenary appellate review because the record established that they were entitled to plain error relief. Gomez II, ___ S.W.3d at ___.

In the present case, the defendant was sentenced on May 16, 2001, after the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), but before Blakely. Because Blakely relied on Apprendi, a determination of whether Blakely announced a new rule of law is necessary to determine if the defendant in the present case is entitled to plenary appellate review or if he is relegated to relief only if plain error occurred.

In this regard, we are guided by State v. Chester Wayne Walters, No. M2003-03019-CCA-R3-CD, White County (Tenn. Crim. App. Nov. 30, 2004), app. denied (Tenn. Mar. 21, 2005), an opinion of this court which predates Gomez I. In Chester Wayne Walters, this court said

> . . . The United States Supreme Court has stated that "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, [542] U.S. [348], [351], 124 S. Ct. 2519, 2522 (2004). The state argues that Blakely does not establish a new rule but merely clarifies the rule announced in Apprendi. In support of its argument, the state notes that the Supreme Court stated in Blakely that "[t]his case requires us to apply the rule we expressed in Apprendi." Blakely, 542 U.S. at [301], 124 S. Ct. at 2536.
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> > A case "'announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government.'" Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989)). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301, 109 S. Ct. at 1070.
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> In Apprendi, the defendant was convicted of many offenses, including second degree possession of a firearm for an unlawful purpose, for shooting into an African-American family's home. Although state law prescribed a sentence of five to ten years for a second degree offense, a New Jersey hate crime statute provided that a judge could enhance the defendant's sentence above the maximum in the range if the crime was racially motivated. Pursuant to the statute, the trial court sentenced the defendant to twelve years in confinement. The Supreme Court reversed, holding that, other than the fact of a prior conviction, the Constitution requires the jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the "prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63.
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> The state contends that Blakely merely extends the rule announced in Apprendi. However, in Graham v. State, 90 S.W.3d 687, 692 (Tenn. 2002), our supreme court held that the noncapital sentencing procedure in this state complied with Apprendi, saying,

> In Apprendi, the United States Supreme Court reviewed a New Jersey provision that allowed a judge to impose a sentence exceeding the statutory maximum for an offense if the judge finds, by a preponderance of the evidence, that the offense constituted a hate crime. The [Tennessee] Supreme Court struck the provision down, holding that due process requires that "any fact, other than a previous conviction, used to enhance a sentence above the statutory maximum must be: (1) charged in the indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt." State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002) (quoting Apprendi, 530 U.S. at 476, 120 S. Ct. 2348). However, the Court emphasized that the judge still retains his discretion to consider all enhancing and mitigating factors "[within the range] prescribed by the statute." Apprendi, 530 U.S. at 481, 120 S. Ct. 2348 (emphasis added).

The petitioner in this case received a sentence within the statutory maximum for each crime. Accordingly, the trial court was well within its constitutional and statutory authority to consider enhancing factors for the purpose of sentencing without the assistance of the jury. Thus, Apprendi provides the petitioner with no relief.

We acknowledge that Blakely extended Apprendi's holding that, under the Sixth Amendment, a jury must find all facts used to increase a defendant's sentence beyond the statutory maximum. However, nothing in Apprendi suggested that the phrase "statutory maximum" equated to anything other than the maximum in the range. To the contrary, the United States Supreme Court stated the issue in Apprendi as "whether the 12-year sentence imposed . . . was permissible, given that it was above the 10-year maximum for the offense charged in that count." 530 U.S. at 474, 120 S. Ct. at 2354. We also note that the Supreme Court has considered the retroactive effect of the holding in Ring v. Arizona, 536 U.S. 584, 592-93, 122 S. Ct. 2428, 2435 n.1 (2002), as a new rule for capital cases even though it was based on Apprendi. See Schriro, [542] U.S. at [357-58], 124 S. Ct. at 2526-27. Perhaps this resulted from the fact that Ring overruled a case that had held the opposite. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990). In this regard, with our own supreme court expressly approving our sentencing procedure

> under Apprendi, we have a difficult time faulting a defendant in Tennessee for not raising the issue before Blakely. We conclude that Blakely alters Tennessee courts' interpretation of the phrase "statutory maximum" and establishes a new rule in this state. The defendant's raising the issue while his direct appeal was still pending is proper.

We acknowledge that this court's Chester Wayne Walters opinion is not in accord with the supreme court's ruling in Gomez I. However, we believe the subsequent developments in the Gomez litigation breathe new life into Chester Wayne Walters. As such, we hold that the defendant in the present case, like the defendant in Chester Wayne Walters, promptly raised his Sixth Amendment issue and is entitled to plenary appellate review.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2003).[1] As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Unless enhancement factors are present, the presumptive sentence to be imposed is the minimum in the range for a Class B, C, D, or E felony. T.C.A. § 40-35-210(c) (2003). The sentence to be imposed by the trial court for a Class A felony is presumptively the midpoint in the range when

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[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal.

there are no enhancement or mitigating factors present. Id. Our sentencing act provides that, procedurally, the trial court is to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Id. § 40-35-210 (2003), Sent'g Comm'n Cmts.; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

The defendant faced a Range I sentence of fifteen to twenty-five years for attempted first degree murder, a Class A felony. See T.C.A. §§ 39-13-202 (first degree murder); 39-12-101 (attempt); 39-11-117(a)(1) (classification of attempted first degree murder as Class A felony); 40-35-112(a)(1) (Range I sentencing for Class A felony). He faced a Range I sentence of three to six years for aggravated assault, a Class C felony. See T.C.A. §§ 39-13-102 (aggravated assault); 40-35-112(a)(3) (Range I sentencing for Class C felony).

In arriving at the twenty-four and five-year sentences, the trial court applied several enhancement factors other than the factor allowing enhancement for the defendant's record of criminal convictions. Because Apprendi and Blakely prohibit the use of judicially found enhancement factors other than the fact of a prior conviction, the trial court should not have enhanced the defendant's sentences based upon statutory factors (2), (6), (9) and (16).

The defendant was still subject to enhanced sentencing for his prior criminal convictions, and the record reflects that the twenty-four-year-old defendant had two misdemeanor convictions for a seat belt violation at age twenty-one and theft of property valued at $500 or less at age eighteen. The state also argued that the defendant had a misdemeanor drug paraphernalia conviction which did not appear in the presentence report, although the court did not state whether it relied upon this purported conviction in enhancing the defendant's sentences for prior criminal convictions.

Because the court applied several enhancement factors which violated the defendant's Sixth Amendment rights as defined by Apprendi and Blakely and because the remaining enhancement factor for prior criminal convictions is based upon two or three misdemeanor convictions, we hold that the error was not harmless beyond a reasonable doubt. See, e.g., State v. Rice, 184 S.W.3d 646, 672-73 (Tenn. 2006) (holding that a constitutional error is presumed to be reversible unless the appellate court concludes that the error was harmless beyond a reasonable doubt). We therefore must remand the case for a determination of the defendant's prior criminal convictions and the appropriate enhancement weight to be applied to the defendant's sentences for his present convictions.

Finally, we note that the United States Supreme Court's remand of this case pertained only to sentencing. When the defendant's appeal was first considered by this court, he raised issues related to the trial court denial of his motion to suppress, the jury instructions on lesser included offenses, and whether his trial counsel was ineffective, in addition to his allegation of sentencing

error. With the exception of the sentencing claim, we reaffirm our previous holdings with respect to all other issues presented in the defendant's previous appeal to this court.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are reversed. The case is remanded for further sentencing proceedings consistent with this opinion.

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JOSEPH M. TIPTON, PRESIDING JUDGE